

STATE OF CALIFORNIA
ELECTRICITY OVERSIGHT BOARD



Gray Davis, Governor

May 29, 2001

Mr. David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**Re: Commission "Surcharge Proposal" in its April 26, 2001 Order
Docket Nos. EL00-95-012 *et al.***

Dear Mr. Boergers:

The California Electricity Oversight Board hereby submits an original electronic filing of its Comments on the Federal Energy Regulatory Commission's "Surcharge Proposal" in its April 26, 2001 Order in Docket Nos. EL00-95-012 *et al.*

Thank you for your assistance.

Sincerely,

Sidney Mannheim Jubien
Chief Counsel
California Electricity Oversight Board

Enclosures

cc: Official Service List of EL00-95-012 *et al*

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Sac Diego Gas & Electric Company,
Complainant,

v.

Sellers of Energy and Ancillary Services Into
Markets Operated by the California
Independent System Operator and the
California Power Exchange,
Respondents.

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange

California Independent System Operator Corporation

Investigation of Wholesale Rates of Public Utility
Sellers of Energy and Ancillary Services in the
Western Systems Coordinating Council

Docket No. EL00-95-012

Docket No. EL00-98-000

Docket No. RT01-85-000

Docket No. EL01-68-000

**COMMENTS OF THE CALIFORNIA ELECTRICITY OVERSIGHT BOARD
ON THE COMMISSION'S SURCHARGE PROPOSAL
IN THE APRIL 26, 2001 ORDER**

I. INTRODUCTION

Pursuant to the Federal Energy Regulatory Commission's ("Commission") April 26, 2001 *Order Establishing Prospective Mitigation and Monitoring Plan for the California Wholesale Electric Markets and Establishing an Investigation of Public Utility Rates in Wholesale Western Energy Markets*, 95 FERC ¶ 61,115 ("April 26 Order"), the California Electricity Oversight Board ("Board") hereby submits the following comments

on the Commission's "Proposal for an Escrow Account for Past Unpaid Bills" ("Surcharge Proposal") contained in the April 26 Order.

In the April 26 Order, the Commission requested comments within 30 days on whether the California Independent System Operator Corporation (CAISO) should be required to institute, on a prospective basis, a surcharge on power sales that will be maintained in an escrow account in order to cover the three California Investor Owned Utilities (IOUs) generators' past unpaid bills to suppliers. April 26 Order at 26. The surcharge would be applied only on real-time power sales through the CAISO to the three IOUs.

II. COMMENTS

The Board strongly opposes the Commission's Surcharge Proposal. As described below, the Surcharge Proposal reflects an extremely poor and impractical regulatory proposal as it is entirely inappropriate and unworkable.

A. The Surcharge Proposal Creates an Inappropriate Role for the Commission and is Not Within the Commission's Jurisdiction

The Surcharge Proposal, as a matter of regulatory policy, places the Commission in the role of regulatory collection agent regarding wholesale sales of energy in California. This is an entirely novel, inappropriate and unwarranted role for the Commission and lies outside of the Commission's jurisdiction under the Federal Power Act. The Commission's responsibility under the Federal Power Act is to protect consumers, not suppliers, by ensuring just and reasonable rates. *City of Detroit v. Federal Power Comm'n*, 230 F.2d 810, 817 (D.C. Cir. 1956) (Commission's primary responsibility is to "guard the consumer against excessive rates") The Commission is not in the role (and has not been historically in the role) of attempting to ensure payment for defaults of

wholesale energy purchases. Sellers have the option to seek, and have sought, judicial relief in the courts. As the Commission is aware, the claimed obligations of California's investor-owned utilities to pay for prior wholesale energy purchases are currently pending in several courts in California, including the U.S. Bankruptcy Court.

The Commission does have jurisdiction and the responsibility to resolve the underlying problem. The alleged debts of sellers form the basis for the Board's and others' claims that the sellers have charged unjust and unreasonable rates. The Commission should order refunds as argued *ad infinitum* by the Board and others in these proceeding.

B. The Surcharge Proposal is Infeasible and Evidences Lack of Commission Understanding of the California's Energy Crisis

Quite aside from the fact that the Commission lacks appropriate jurisdiction to implement the Surcharge Proposal, the surcharge concept itself evidences the unfortunate continued failure of the Commission to grasp the magnitude and severity of California's energy crisis and to remain cognizant of the changes and developments that define the landscape of the State's dire energy circumstances. As described below, implementing a scheme that collects unpaid charges via a surcharge on power sales in the CAISO's real time energy market, and anticipating that such an approach would successfully resolve the issues of unpaid debt, is utterly infeasible. Even worse than being unworkable, such an approach would ultimately undermine efforts to restore California's wholesale markets to workably competitive conditions.

Specifically, the Commission has no appreciation of the magnitude of amount sellers' allege to be owed and what kind of surcharge would be required to collect that amount. The amount appears to be at least 9.2 billion dollars. Given the current volume

of the CAISO's real-time imbalance market, only approximately 9 million MWhs will likely clear in that market in the Year 2001. Given these assumptions the Board offers the following examples.

First, using a surcharge that might be considered "reasonable" at a practical level, and a level that might not create an enormous distortion in the functioning of the real-time market itself, would take an absurd period of time to collect. For example, if a \$10/MWh surcharge were implemented (reflecting at least a 20% surcharge in regional markets that are considered to be producing competitive prices), the collection period would last for 102 years!

Second, if an extremely high surcharge, such as \$50/MWh were implemented (reflecting approximately a 100% surcharge in regional markets that are producing competitive prices), the collection period would last for 20 years! A \$50/MWh surcharge, however, would certainly create significant market distortions that would prevent the market from functioning competitively. Maintaining a \$50/MWh surcharge would skew market participation – in much the same way as an underscheduling penalty would – and would create artificial price distortions that would affect local and, possibly, regional market operations for years to come.

///

///

///

///

///

///

III. CONCLUSION

Based on the foregoing, the Board adamantly opposes the Commission's Surcharge Proposal and the attendant notion that the Commission could appropriately or practically institute a mechanism to collect past-due amounts through surcharges on power sales in CAISO's real-time market.

Dated: May 29, 2001

Respectfully submitted,

Erik N. Saltmarsh
Chief Counsel
Sidney Mannheim Jubien
Senior Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2001, I served the foregoing document upon each person designated on the official service list for these proceedings compiled by the Secretary.

Dated at Sacramento, California, this 29th day of May 2001.

Lawrence Cook
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
(916) 322-8601